Supreme Court, U.S.
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90-1452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEAR SIEGLER, INC., a Delaware Corporation,
Petitioner,

v.

RANDALL SCOTT KIRBY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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March 13, 1991

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QUESTION PRESENTED

Whether the court of appeals in this diversity case departed from settled principles governing federal court determinations of state law by expressly rejecting and refusing to follow the latest decision from a state intermediate appellate court.

LIST OF PARTIES

The caption of the case contains the names of all parties.

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PETITION FOR WRIT OF CERTIORARI

Lear Siegler, Inc. ("Lear Siegler") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is unreported. The opinion of the district court (App. B, *infra*, 3a-10a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered in November, 1990. The court denied a timely petition for rehearing on December 13, 1990 (App. D, *infra*, 16a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This product liability suit involved the application of Missouri common law, as set out fully below, by a federal court.

STATEMENT OF THE CASE

A. The Accident

This is a product liability action arising from an accident in 1986. Respondent Randall Kirby was injured while using a fifty-one foot long portable grain auger manufactured by petitioner Lear Siegler. A grain auger is a simple farm implement used to transport seed or grain. A long rotating corkscrew encased in protective housing carries grain or seed from an intake area on the auger to the auger downspout. It is a familiar scene on farms to see a stream of grain or seed pouring from the top of an auger into a waiting grain truck or silo.

Lear Siegler manufactured the auger involved in this case in 1979. When it left the factory, the auger had a guard over the intake opening at the bottom of the auger as well as protective guards mounted over the entire length of the drive shaft. These guards were designed to be easily removable for routine maintenance, including lubrication. The guards also had to be removed to clear the auger if it became clogged.

On the day of his accident, Kirby was loading grass seed into a grain truck from the warehouse of his employer, the Empire Seed Company. Empire Seed loaded grass seed onto trucks through an opening high on the wall of the warehouse by use of the portable grain auger. The process of loading seed with the auger required two tractors. One tractor had a power take off ("PTO") shaft connected to the auger, which supplied the power to drive the auger. Empire Seed used the second tractor to load grain into the intake end at the bottom of the auger.

Empire Seed jury-rigged the storage of seed at this warehouse to help dry it. Along one wall of this warehouse it mounted dryers at floor level. Along another wall it laid large concrete blocks on the floor, and stacked hollow wooden pallets on top of the blocks. It then spread cheesecloth over the top of the pallets to prevent the seed from falling through the pallets and cinder blocks, and the seed was piled on top of the cheesecloth. Understandably, the auger from time to time became clogged with cheesecloth, broken pallet boards and even pieces of broken concrete block. Such a clog caused the auger or its power unit to shut down and the operator had to clear the clog before the auger could operate again.

On the day of his accident, Kirby was loading seed into the intake opening on the auger using the tractor equipped with a front-end loader. Kirby noticed that the auger had clogged and left the loading tractor to turn off the power. He then cleared the clog by sliding a metal sleeve covering an inspection hole on the auger down the auger tube to expose the hole. Kirby reached into the auger and pulled out a piece of cheesecloth. Kirby did not have to remove the guards over this part of the drive shaft to clear the clog on this day, however. Empire Seed had removed the guards earlier and they were missing at the time of the accident.

Once Kirby cleared the clog, he restarted the power drive tractor. After he had determined that the auger was once again running normally, Kirby got off the power drive tractor and left it running. Because the auger was operating and the inspection hole was not covered by its sleeve, seed was coming out of this hole. Kirby approached the auger intending to slide the sleeve or cover back up the auger to cover the inspection hole. As he reached over the top of the unguarded, rotating drift shaft, with the inspection hole open, Kirby's shirt sleeve was caught and his left arm was drawn into the drive shaft and injured.

Kirby admitted repeatedly, as did his experts, that the accident would not have happened if the guards furnished with the auger had not been removed.

B. Proceedings in the Lower Courts

In December of 1987, Kirby filed a complaint against Lear Siegler in federal court in Missouri claiming under both negligence and strict liability theories. Kirby claimed that Lear Siegler had defectively designed its auger in a variety of ways and that it failed to warn of these defects. Kirby also sought punitive damages.

After substantial discovery, Lear Siegler moved for summary judgment. Lear Siegler contended that under clear Missouri law a manufacturer has no liability when a purchaser modifies a safe product and that modification makes the product unsafe. *See Gomez v. Clark Equipment Company*, 743 S.W.2d 429 (Mo. App. 1987). The manufacturer is absolved even when the modification is foreseeable. *Id.* at 432. As discussed fully below, the trial judge denied the summary judgment motion (App. C, *infra*, 11a-15a), concluding that the three Missouri appellate judges in *Gomez* had incorrectly interpreted Missouri law regarding modification.

The case then went to trial solely on the issue of strict liability for design defect and failure to warn, and the jury returned a verdict of $500,000. The trial judge subsequently denied Lear Siegler's motion for judgment notwithstanding the verdict and alternative motion for a new trial. The federal judge again ruled that the Missouri appellate judges had incorrectly interpreted Missouri law. App. B, *infra*, at 6a-8a.

Lear Siegler appealed the case to the Eighth Circuit. That court affirmed the trial judge's rulings by unpublished per curiam order. App. A, *infra*, at 1a-2a.

REASONS FOR GRANTING WRIT

The concept of "our federalism" represents a delicate balancing of legitimate state and federal interests. *Younger v. Harris*, 401 U.S. 37, 44 (1971). The federal courts here have failed that balancing miserably. A single federal trial judge in the court below ruled that a panel of three Missouri appellate judges, which decided the dispositive Missouri decision, simply did not understand and therefore misinterpreted and misapplied Missouri law. He therefore refused to follow the only Missouri law on point. The Eighth Circuit affirmed the trial court without explanation or opinion. The Eighth Circuit decision is therefore directly contrary to the most recent pronouncement of Missouri law by a Missouri appellate court.

The affront to principles of federalism is obvious. Federal courts are required to follow decisions of state appellate courts. Without more, this Court has ample ground to review this decision. But the practical consequences are likewise dramatic. A product manufacturer sued in Missouri state court has a complete defense if a consumer modifies a product and later suffers an injury. The same manufacturer in federal court has no such defense. This erroneous ruling will lead to widespread forum shopping by plaintiffs who can satisfy diversity jurisdiction. The very existence of this split in authority demands intervention by this Court.

It is the primary responsibility of state courts, not the federal courts, to construe and apply state statutes and common law. The express refusal of a federal court to follow state law as announced by a state appellate court has long been grounds for review of the federal decision. *See, e.g., Six Companies v. Highway District*, 311 U.S. 180 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467 (1940). Indeed, in certain instances the Court has acted summarily to preserve the integrity of these principles of federalism announced in *Erie R. Co.*

v. Tompkins, 304 U.S. 64 (1938). *See, e.g., Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956). The instant case deserves similar treatment. The decision of the court of appeals is so plainly wrong that it should not be allowed to stand, and summary reversal is justified. *See, e.g., Freeport McMoRAN, Inc. v. K.N. Energy, Inc.*, 111 S.Ct. 858 (1991).

I. THE COURT OF APPEALS PLAINLY VIOLATED THE FUNDAMENTAL PRINCIPLES ESTABLISHED BY THIS COURT FOR DETERMINING STATE LAW

A. The Court of Appeals Ignored Controlling State Court Decisions

This Court ruled in *Erie* that federal courts must follow state substantive law in cases in which state law is the source of the cause of action. The *Erie* principle "expresse[s] a policy that touches vitally the proper distribution of judicial power between state and federal courts" that is "so important to our federalism." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109-10 (1945). Its purpose is to ensure that the state and federal courts in a state apply the same substantive law irrespective of the happenstance of federal jurisdiction. Such even-handed justice discourages forum shopping and avoids unfair discrimination between state and federal litigants. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965) ("the twin aims of the *Erie* rule . . . [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws"). "The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States." *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1280 (1990).

The duties of federalism are not limited to state supreme courts. A federal judge must follow and apply the decision of state intermediate appellate courts just like

state supreme courts. The decision of an intermediate state appellate court " 'is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Hicks v. Feiock*, 485 U.S. 624, 630 n.3 (1988), quoting *West v. A.T. & T. Co.*, 311 U.S. 223, 237-38 (1940). It is

> "the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State. An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

Fidelity Trust Co. v. Field, 311 U.S. 169, 177-78 (1940).

The federal courts here flatly disregarded these guiding principles laid down by this Court. The federal trial judge reviewed *Gomez v. Clark Equipment Co.*, 743 S.W.2d 429 (Mo. App. 1987), the most recent and clearest pronouncement by a Missouri appellate court of the law applicable to this case, and unabashedly pronounced that these three Missouri judges had simply misunderstood Missouri law.

Gomez is remarkably similar to the present case. In *Gomez* the operator of a lift truck crushed several fingers while maneuvering her truck. Her employer had modified the lift truck by removing the fuel tank supplied by the manufacturer and adding a larger tank, which obstructed the vision of the driver. The *Gomez* court fully reviewed Missouri law. It concluded that, in Missouri, if the modification of a product makes a safe product unsafe then the manufacturer is not liable, even if the modification was foreseeable. 743 S.W.2d at 432. The modification acts as a supervening cause which absolves the manufacturer of any liability. *Id.* The court made clear that

this issue is one for the court not the jury. The modification bars plaintiffs' claim as a matter of law. *Gomez*, 743 S.W.2d at 433; *see also Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1021 (8th Cir. 1974).

The federal trial judge here openly acknowledged that "*Gomez* is the last Missouri case which addresses this particular issue [modification]." App. B, *infra*, 6a. The judge nonetheless refused to apply the law of *Gomez* to the modification in this case. He examined the same cases that the three Missouri appellate judges examined in *Gomez*, and simply pronounced their analysis of Missouri law wrong:

> "While the *Vanskike* and *Hales* language is awkward using a double or triple negative, this Court is of the opinion that *Vanskike* and *Hales* hold that if the modification is foreseeable and if it is foreseeable that modification will make the product unsafe, then the manufacturer is not relieved from liability."

App. C, *infra*, 14a; *see also* App. B, *infra*, 6a.

A federal judge may not disregard a state appellate decision unless there is "persuasive data that the highest court of the state would decide otherwise." *Hicks*, *supra*, 485 U.S. at 630 n.3. No such data is present here. In the first place, the federal judge relied primarily on the federal cases quoted above to reject *Gomez*, not on Missouri law. Moreover, the three Missouri judges understood that the federal cases used confusing language. Indeed, the Missouri judges in *Gomez* reviewed and distinguished these very cases and their confusing language based on Missouri law. *Gomez*, 743 S.W.2d at 432-33.[1]

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[1] In *Hales v. Green Colonial, Inc.*, 490 F.2d 1015, 1020 (8th Cir. 1974), retailers sold a heater for use with natural gas. The retailers also supplied a conversion kit to modify the heater for use with LPG fuel. *Gomez* concluded that the modification of the heater using the kit was not a superseding cause, because modification for use with LPG fuel was intended by the retailer. S.W.2d 743 at 432-33.

Likewise in *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), removal of retaining

The Missouri appellate judges relied on Missouri law to determine how modification of a product is treated in Missouri.[2] The interpretation of Missouri law by these judges is sensible, rational and in complete keeping with the public policy of Missouri. Many state courts and legislatures have grown increasingly dissatisfied in recent years with the explosion of products liability lawsuits and the treatment of manufacturers as near insurers of their products.[3] The Missouri law set out in *Gomez* is fully defensible. But Missouri judges are not required to defend their interpretation of Missouri law to federal judges. A single federal judge cannot simply overrule and reject the reasoned analysis of Missouri law by three Missouri judges. That is exactly what happened here.[4] And by rejecting Missouri law, the federal judge denied Lear Siegler any access to its best defense under Missouri law. Federalism demands more.

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rings from a railroad car was not a superseding cause where there was evidence that the hitch was completely defective so that it could not hold the rings at all. *Gomez*, 743 S.W.2d at 443.

[2] *See Gomez*, 743 S.W.2d at 432-33 (discussion of *Jarrell v. Fort Worth Steel & Manufacturing Co.*, 666 S.W.2d 828, 835 (Mo. App. 1984), and *Duke v. Gulf & Western Manufacturing Co.*, 660 S.W.2d 404, 414 (Mo. App. 1983)).

[3] *See, e.g.*, 76 A.B.A. Journal 35 (Mar. 1990) (discussing the marked "decline in judicial receptivity to products cases"); 39 Defense L. J. 279 (1990). Missouri recently reformed its tort laws to lend additional protection to manufacturers. *See* L. 1987 H.B. No. 700 § C, effective July 1, 1987.

[4] The federal trial judge here suggested that *Gomez* was "contradictory to" *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986). App. B, *infra*, 6a-7a. As stated above, the federal courts must follow state intermediate courts unless "persuasive data" compels a departure from that court. *Hicks, supra*, 485 U.S. at 630 n.3. The *Nesselrode* case did not deal with or discuss the modification of a product by a consumer. Nor did it discuss the concept of intervening cause. It provides no suport for the action of the federal court here. Certainly the *Gomez* court had access to the *Nesselrode* decision and the general statements of black letter law for products actions it contains.

Only one Missouri case, *Gomez*, deals directly with the issue of modification of a product by a consumer. Under *Gomez*, Lear Siegler is entitled to a determination as a matter of law on the issue of modification. Lear Siegler manufactured a grain auger that left its factory with safety shields intact. Kirby's employer removed these safety shields. Lear Siegler does not dispute that the shields were designed to be removable for various maintenance. Nonetheless, if the modification of this auger by removing critical safety shields was a supervening cause of injury, then Lear Siegler is not liable under any theory. The federal court here refused to even address the issue. Under its interpretation of Missouri law, Lear Siegler could not raise such a defense because the modification was foreseeable. App. C, *infra*, 14a ("The evidence in this case indicates that defendant foresaw and even observed farm equipment being operated with guard devices removed . . ."). Missouri law demands no such thing. Lear Siegler is entitled to a determination on the issue of modification, just as if it were in state court. A federal court has denied Lear Siegler this right. The court of appeals ruling is clearly wrong and should not be allowed to stand.

B. The Court of Appeals Error Raises Issues of Fundamental Importance

The decision of the federal courts here violates all of the principles of *Erie*. It will lead to inequitable administration of laws—one law in state court, the opposite in federal. It will encourage blatant forum shopping by Missouri plaintiffs lucky enough to meet diversity requirements. And perhaps most egregious, it will allow a single federal judge to overrule three Missouri appellate judges and their interpretation of Missouri law. This Court should not condone such blatant disregard for our federalism.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment below should be summarily reversed or the case should be set for briefing and argument.

Respectfully submitted,

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March 13, 1991

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1410

RANDALL SCOTT KIRBY,
Appellee,

v.

LEAR SIEGLER, INC.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: October 10, 1990

Filed:

Before LAY, Chief Judge, BRIGHT and TIMBERS,* Senior Circuit Judges.

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* The HONORABLE WILLIAM H. TIMBERS, Senior Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

PER CURIAM.

Lear Siegler, Inc., appeals from the district court's [1] order in this diversity case denying its motion for judgment notwithstanding the verdict and alternative motion for a new trial. We construe the appeal as taken from the final judgment on the jury verdict. *See McGowne v. Challenge-Cook Bros. Inc.*, 672 F.2d 652, 658-59 (8th Cir. 1982). Randall Kirby injured his left arm while using a grain auger manufactured by Lear Siegler, and the jury awarded him $500,000 on a theory of strict products liability. After carefully reviewing the record and hearing oral argument, we find no prejudicial error of law or fact. We affirm the judgment of the district court on the basis of its well-reasoned opinion. *See* 8th Cir. R. 47B.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

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[1] The Honorable Russell G. Clark, United States District Judge for the Western District of Missouri.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3657-CV-S-4

RANDALL SCOTT KIRBY,
Plaintiff,

vs.

LEAR SIEGLER, INC.,
Defendant.

ORDER

[Filed Feb. 6, 1990]

On December 14, 1989 following a jury verdict, judgment was entered in favor of plaintiff and against defendant in the amount of $500,000.00.

On December 26, 1989 defendant filed a motion for judgment notwithstanding the verdict and an alternative motion for a new trial. While defendant's motions were filed on the 12th day after entry of judgment, the motions were timely filed in that the 10th day was a Sunday and the 11th day was Christmas Day. (F.R.C.P. 6).

Very briefly the facts are as follows: Plaintiff was an employee of Empire Seed Company and was employed at Rogers, Arkansas. At the time of his injury he was engaged in transporting fescue seed from his employer's warehouse in Monett, Missouri to Arkansas. At the time of the injury he was using a grain auger manufactured

by defendant to load a grain trailer from seed which was stored in the employer's warehouse. The auger was powered by the power take off of a farm tractor. The auger became clogged and a coupler broke. The plaintiff stopped the auger, removed the covering from the clean out hole and pulled a handful of cheesecloth out of the auger. He then repaired the coupler using a bolt and restarted the auger. After restarting the auger he reached over the top of it and the unguarded rotating shaft to attempt to slide the cover back over the clean out hole. His shirtsleeve and arm were pulled into the drive shaft inflicting severe injuries to his arm.

When the auger left the manufacturer there were shields or guards over the drive shaft; however, at the time of plaintiff's injury, these guards had been removed. The guards were attached to the auger by means of screws and were removable. As a matter of fact at least one guard had to be removed in order to grease the auger. At the time of plaintiff's injuries the guards which had been installed by the manufacturer at the intake part of the auger had been removed and a modified guard installed in its place. Also near the intake portion of the auger the manufacturer had placed a warning that the auger should not be used without the guards in place; however, this warning had become obliterated and worn away long before plaintiff was injured. There was no warning on the guards themselves and particularly no warning in the area where plaintiff was working when his arm got caught by the drive shaft.

The case was submitted to the jury on a strict liability products theory that the auger was defective and unreasonably dangerous when put to a reasonably anticipated use and that it was unreasonably dangerous due to defendant's failure to give an adequate warning of the danger. A contributory fault instruction was given on behalf of defendant. In the plaintiff's verdict directing instructions the jury was told that they could find in

favor of plaintiff if the defect "directly caused or directly contributed to cause damage to plaintiff."

The standard for granting a directed verdict and a judgment notwithstanding the verdict are the same under federal law. A directed verdict should be granted only when all the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party. *Dill* v. *Janklow*, 828 F.2d 481 (8th Cir. 1987). The evidence must be viewed in the light most favorable to the nonmoving party and the Court must assume that all conflicts in the evidence were resolved in plaintiff's favor and must assume as proven all facts which plaintiff's evidence tended to prove. *Sunkyong International, Inc.* v. *Anderson Land and Investment Company*, 828 F.2d 1245 (8th Cir. 1987). The authority to grant a new trial however is confined almost entirely to the exercise of discretion on the part of the trial court. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36, 101 S.Ct. 188, 191, 66 L.Ed.2d 193 (1980). A trial court may grant a new trial for the reason that the jury verdict is against the weight of the evidence. In making such a determination the trial court may makes its own evaluation of the evidence, may weigh the evidence, may disbelieve witnesses and grant a new trial even where there is substantial evidence supporting the jury verdict. *Brown By Brown* v. *Syntex Laboratories, Inc.*, 755 F.2d 668 (8th Cir. 1985); and *Ouachita National Bank* v. *Tasco Corporation*, 686 F.2d 1291 (8th Cir. 1982).

In the motion for judgment notwithstanding the verdict, defendant contends that there was not sufficient evidence to make a submissible case that the auger at the time of manufacture and sale was in a defective condition, unreasonably dangerous when put to a reasonably anticipated use, whether such claim was based upon a defect in design or on the inadequacy of the warning. Defendant further contends that the evidence failed to

disclose that the auger was being used in a manner reasonably anticipated and that it had been modified by removal of the drive shaft guards, enlargement of the guard at the intake of the auger and by replacement of roll pins and bolts in the drive shaft couplers.

There was sufficient evidence for the jury to find that defendant knew that many farmers used the auger with the drive shaft guards removed and also that it was a common practice to replace the roll pins in the couplers with bolts. There was also evidence that even with the intake guard furnished with the auger by defendant it had on occasion become clogged which necessitated the removal of the drive shaft guards in order to unclog the auger. The only real issue in defendant's motion is whether there had been such modification in the auger to relieve the defendant of any liability. In this regard defendant relies on the case of *Gomez* v. *Clark Equipment Co.*, 473 S.W.2d 429 (Mo. App. 1987) which in interpreting language in *Vanskike* v. *ACF Industries, Inc.*, 665 F.2d 188, 195 (8th Cir. 1981) concluded that "if the modification is foreseeable but the modification makes a safe product unsafe, the manufacturer is not liable." *Gomez* is the last Missouri case which addresses this particular issue. However in denying defendant's motion for summary judgment in an order issued November 2, 1989, this Court ruled that the *Gomez* court misinterpreted the *Vanskike* language. In *Vanskike* it was stated: "Subsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes did not unforeseeably render the product unsafe." *Id.* at 195.

A correct interpretation of that language would be that the manufacturer is not relieved from liability if the modification is foreseeable and if it could have been foreseen that such modification would create a hazard. In this Court's opinion the *Gomez* statement of Missouri law is inconsistent with and contradictory to the law as

expressed in *Nesselrode* v. *Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. banc 1986) where the court stated that the concept of reasonably anticipated use includes misuse and abnormal use which is objectively foreseeable. The *Nesselrode* court also stated that underneath the conceptual umbrella of proximate cause can be found the concepts of misuse, abnormal use, reasonably anticipated use, and contributory fault. The court concluded that the manufacturer of the actuators could have reasonably anticipated that Executive would make an abnormal use of the actuators.

In *Bhagvandoss* v. *Beiersdorf, Inc.*, 723 S.W.2d 392 (Mo. banc 1987) the court stated that a product may be unreasonably dangerous and defective even though it would not have caused injury when used properly if the actual use is one reasonably anticipated by the manufacturer.

Without belaboring the issue as to whether a manufacturer is relieved from liability if the modification makes a safe product unsafe, it is the opinion of the Court that defendant is not entitled to a judgment notwithstanding the verdict. The drive shaft guards were designed so that they could be removed and in certain circumstances had to be removed. Therefore, in this regard there was no modification in the design of the guards. Since the guards were designed to be removed, the mere failure to replace them upon removal does not constitute such a modification as to relieve the manufacturer of liability. The same can be said for substitution of bolts for roll pins in the couplers.

The only warning placed on the auger by the manufacturer to not use it without the drive shaft guards in place was located near the intake section of the auger. This was several feet from the point where plaintiff suffered his injury. In addition this warning had been worn away or completely obliterated long before plaintiff's injury. The place where the injury occurred was

at a point where the manufacturer knew that it would be most likely required that a guard would be removed in order to unclog the machine, grease the drive shaft or to replace coupler pins. It was clearly a jury issue as to whether failure to place a warning in this specific area rendered the product unreasonably dangerous. The auger was being used to load grain which was the very use for which it was manufactured and thus it was an anticipated use. In addition there was evidence that defendant knew that augers were used with the guards removed and also knew that bolts were frequently substiuted for roll pins. Defendant's motion for judgment notwithstanding the verdict will be denied.

In the alternative to its motion for judgment notwithstanding the verdict, defendant has moved for a new trial. It set forth numerous issues for which it claims a new trial would be appropriate. It alleges that there was insufficient evidence for the submission of Instruction No. 5, plaintiff's verdict directing instruction. The Court has addressed this issue in denying defendant's motion for judgment notwithstanding the verdict and will not address it further. The defendant also alleges that there was insufficient evidence to submit Instruction No. 7, plaintiff's verdict directing instruction, on the issue of inadequate warning. The basis for this instruction is that the danger confronting plaintiff was open and obvious and therefore defendant had no duty to warn.

In a products liability case plaintiff's contributory negligence is not an issue. *Ponte* v. *Harley Davidson Motor Co.*, 732 S.W.2d 561 (Mo. banc 1987). For contributory fault to be a defense it must be shown that the user discovered the defect and was aware of the danger but nevertheless proceeded unreasonably to make use of the product and was injured by it. *White* v. *Thompsen Concrete Pump Company*, 747 S.W.2d 655 (Mo. App. 1988). Defendant relies on *Haines* v. *Powermatic Houdaille, Inc.*,

661 F.2d 94 (8th Cir. 1981) as support for its position. That case merely holds that it was not error for the trial court to give a contributory fault instruction. One was given in this case. The issue was one for the jury which was decided adversely to defendant.

Defendant also claims that it is entitled to a new trial as a result of the Court not admitting the admission by plaintiff made to his employer Royal Carnes that the accident was his fault. At the time the statement was made the evidence discloses that plaintiff was under heavy sedation and was in severe pain. It was not a statement concerning a fact but at most was a conclusion. Obviously the plaintiff did not know the law concerning strict liability. He may have felt that he was contributorily negligent which would not be a defense.

Defendant also alleges that it is entitled to a new trial because of the admission of the testimony of plaintiff's economic expert Larry G. Cox. The testimony of Mr. Cox set forth the average earnings of a high school graduate and it was not restricted by the work history of plaintiff; however, it is clear that the jury did rely upon Mr. Cox's testimony in returning his verdict. Any error in permitting the testimony of Mr. Cox was at the worst, harmless error.

Defendant also contends that it is entitled to a new trial because of the admission of evidence concerning prior accidents. These accidents involved an unguarded rotating shaft which was the hazard presented in the instant case. In addition this evidence was admissible to show that defendant knew that such machines were being operated by users without the benefit of a guard.

Defendant also bases its motion on the admission of opinion testimony by experts concerning the inadequacy of warnings, foreseeability, unreasonable danger and defectiveness on the basis that such testimony invades the province of the jury. Under Fed.R.Evid. 704(a) such

testimony is not objectionable on the basis that it invades the ultimate issue to be decided by the trier of fact.

Defendant also alleges that it is entitled to a new trial because of the admission concerning designs and warnings offered by another manufacturer, Mayrath, some ten years after the auger in issue was manufactured. The designs and warnings incorporated in Mayrath's product were well known in the engineering field prior to the manufacture of the auger in this case. This testimony was helpful to the jury in determining whether the product in question was defective and whether there was an adequate warning.

Plaintiff testified that while he knew he should not touch the rotating shaft, he was not aware that there was a danger of a protrusion on the shaft catching his shirt and thus wrapping his arm around the rotating shaft. He also testified that had there been a warning he would have abided by it.

As stated above in denying the defendant's motion for judgment notwithstanding the verdict, the only warning placed on the equipment was completely obliterated long before plaintiff's injury. These issues were properly submitted to the jury and found by the jury against defendant.

It is

ORDERED that defendant's motion for judgment notwithstanding the verdict is denied; and it is further

ORDERED that defendant's alternative motion for a new trial is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK
Judge
United States District Court

Date: February 6, 1990

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

No. 87-3657-CV-S-4

RANDALL SCOTT KIRBY,
Plaintiff,

VS.

LEAR SIEGLER, INC.,
Defendant.

ORDER

[Filed Nov. 2, 1989]

Defendant has moved for summary judgment on Count I of plaintiff's complaint. Count I alleges strict liability by reason of defendant's manufacture of a defective grain auger.

There are well settled principles in ruling a motion for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact present in the case and judgment should be awarded to the party seeking the motion as a matter of law. *Percival* v. *General Motors Corporation*, 539 F.2d 1126, 1129 (8th Cir. 1976). However, because summary judgment remedy is drastic, it should not be granted unless the moving party has established the right to a judgment with such clarity that there is no room for controversy. *Jewson* v. *Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). In addition, the party opposing summary judgment motions may not rest upon the allegations in their pleadings. The non-

movant must resist the motion by setting forth specific facts showing there is a genuine issue of fact for trial. Fed.R.Civ.P. 56(e); *Burst* v. *Adolph Coors Company*, 650 F.2d 930, 932 (8th Cir. 1981). In *Green* v. *United States Dept. of Labor*, 775 F.2d 964, 973 (8th Cir. 1985), the Court stated that such a motion is to be viewed in the light most favorable to the opposing party who also must receive the benefit of all reasonable inferences obtainable from the material before the Court. In *Butler* v. *MFA Life Ins. Co.*, 591 F.2d 448 (8th Cir. 1979), the Court held that summary judgment should not be granted unless the moving party has established his right to judgment with such clarity that no room for controversy remains and has demonstrated that the nonmoving party is not entitled to recover under any discernible circumstances.

In ruling a motion for summary judgment, the Court does not decide material factual issues, rather it determines whether or not they exist. *Columbia Union National Bank* v. *Hartford Accident and Indemnity Co.*, 669 F.2d 1210 (8th Cir. 1982). Summary procedures are appropriate where the issues for resolution are primarily legal rather than factual. *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 585 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 707 (1988). Issues of fact must be material to a resolution of the dispute between the parties; where the only disputed issues of fact are immaterial to the resolution of the legal issues, summary judgment is appropirate. *Lomar*, 824 F.2d at 585.

With these standards in mind, the Court will proceed to consider defendant's motion for summary judgment.

Very briefly, the facts are as follows: Plaintiff was an employee of Empire Seed Company and was employed at Rogers, Arkansas. At the time of his injury he was engaged in transportation of fescue seed from his employer's warehouse in Monett, Missouri to Rogers, Ar-

kansas. At the time of his injury he was using the grain auger manufactured by defendant to load a grain trailer. The auger became clogged and a coupler broke. Plaintiff stopped the auger, removed the cover from the clean-out hole and pulled a handfull of cheese cloth out of the auger. He then repaired the coupler using a bolt and restarted the auger. After restarting the auger he reached over the top of the auger and the unguarded, rotating drive shaft to attempt to slide the cover back over the clean-out hole. His shirt sleeve and arm were pulled into the drive shaft, injuring him. When the auger left the manufacturer there were shields or guards over the drive shaft; however, at the time of his injury, these guards had been removed. Defendant contends that by removal of the guards there was such a material change in the auger as manufactured by it to relieve it of liability as a matter of law.

The parties agree that the substanitve law of Missouri applies in this case. They also agree that the essential elements of a strict liability case are as follows: (1) the defendant sold or manufactured the grain auger in the course of its business; (2) the grain auger was then in a defective condition unreasonably dangerous when put to a reasonably expected use; (3) the grain auger was used in the manner reasonably anticipated; and (4) plaintiff was damaged as a result of the defective condition that existed *when the grain auger was sold.*

In support of its motion for summary judgment defendant relies on only one Missouri case: *Gomez* v. *Clark Equipment Co.*, 743 S.W.2d 429 (Mo. App. 1987). In *Vanskike* v. *AFC Industries, Inc.*, 665 F.2d 188 (8th Cir. 1981) the court stated:

> [S]ubsequent changes or alterations in the product do not relieve the manufacturer of strict liability if the changes were foreseeable and the changes did not unforeseeably render the product unsafe.

Substantially the same language appears in *Hales* v. *Green Colonial, Inc.*, 490 F.2d 1015, 1020 (8th Cir. 1974). *Gomez* interprets the *Vanskike* and *Hales* language to hold:

> If a modification is foreseeable but the modifications make a safe product unsafe the manufacturer is not liable.

While the *Vanskike* and *Hales* language is awkward using a double or triple negative, this Court is of the opinion that *Vanskike* and *Hales* hold that if the modification is foreseeable and if it is foreseeable that the modification will make the product unsafe, then the manufacturer is not relieved from liability.

The evidence in this case indicates that the defendant foresaw and even observed farm equipment being operated with guard devices removed and thus could foresee that the auger which injured plaintiff would be used with the guard shields removed. Since the guard shields were removable, this Court is of the opinion that it becomes a jury issue as to whether this constituted a material modification of the auger. A jury might very well determine that operation of the auger without the shields was nothing more than a misuse of the product. In *Jarrell* v. *Fort Worth Steel and Manu. Co.*, 666 S.W.2d 828 (Mo. App. 1984) the court held that where there is both a design defect and a misuse of the product each of which contributes to the accident, the misuse does not become an intervening cause if the misuse was foreseeable. Plaintiff contends that the danger could have been eliminated by various design changes in the product. It is a jury issue as to whether failure to make one or more of these possible changes rendered the product defective at the time of its manufacture and its sale. There are genuine issues of fact which are disputed in this case which make granting defendant's motion for summary judgment on Count I inappropriate.

It is

ORDERED that defendant's motion for summary judgment on Count I of plaintiff's complaint is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: November 2, 1989

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1410WM

RANDALL SCOTT KIRBY,
Appellee,

v.

LEAR SIEGLER, INC.,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Appellant's petition for rehearing has been considered by the court and is denied.

December 13, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk
U.S. Court of Appeals
Eighth Circuit